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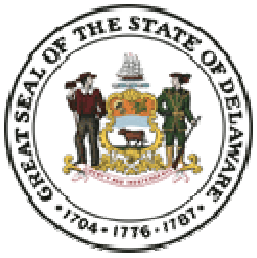

COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

Cases Summarized and Compiled by
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DELAWARE SUPREME COURT CASES
JANUARY 1, 2010 THROUGH MARCH 31, 2010

WATSON V. STATE, (1/6/10): FELONY RESISTING ARREST/PROBATION OFFICERS

D convicted of Resisting Arrest with Force and Violence. The charges stemmed from injuries that 2 probation officers sustained while trying to arrest D for violating his probation.

On appeal, D argued that the trial court erred by denying his request for a jury instruction on a lesser included offense of misdemeanor resisting arrest because there was an issue as to whether force or violence occurred. However, the Court was more concerned with the preliminary issue of whether the felony Resisting Arrest dealt with arrests made by probation officers. The Court reasoned that the statute expressly prohibits violence against police officers and the definition of police officer under 11 *Del. C.* §1911 specifically excludes probation officers. On the other hand, misdemeanor resisting addresses all peace officers which includes probation officers. The Court, therefore, reversed and remanded the case for judgment on the lesser included.

ASHLEY V. STATE, (1/15/10): "INTENT TO SELL"/ EXPERT TESTIMONY

D was pulled over for erratic driving. He was sweating profusely and disoriented. A torn baggie of heroin was found nearby. There were also 115 other bags of heroin in the car. There were no other indicia of sale. D moved for judgment of acquittal on the charge of PWITD based on officer's testimony that the evidence revealed D was a user. However, the officer also opined that he possessed the drugs for sale. The motion was denied and D was convicted of the PWITD.

On appeal, the Court concluded that a D can be both a user and a dealer. The Court held that quantity and packaging alone are insufficient, but the officer's expert testimony combined with other evidence is sufficient to sustain the additional element of intent to distribute. The officer's testimony goes beyond a mere inference and is subject to cross examination.

D also claimed that the expert's, (officer's), testimony was inadmissible under Delaware Rule of Evidence 702 and *Daubert*. D argued that the methods used were not supported by sufficient facts and the expert did not apply a reliable and scientific approach in reaching conclusions. The Court rejected these arguments noting that they are not consistent with clear case law that an expert's testimony can satisfy the "something more" requirement in addition to quantity and packaging to establish intent to sell. Any infirmity in that conclusion was for the jury to decide. AFFIRMED.

MOYE V. STATE (1/20/10): IMPROPER JURY INSTRUCTIONS/ SELF DEFENSE/CHOICE OF EVILS

D boarded a bus and found a seat. The bus driver, V, told D that he needed to pay. V claimed D returned to the front and punched V. After V called dispatch, D and V got into a scuffle. When police arrived, D resisted arrest. D was taken to the hospital with injuries but chose to spit blood at the nurse who treated him. When police tried to control him, D bit one of the officers. D moved for a judgment of acquittal on the assault charges claiming P failed to prove physical injury in each case. After that was denied, D claimed self defense. However, the judge gave a "choice of evils" instruction for some reason. D did not object.

On appeal, D argued that the judge erroneously denied his motion for judgment of acquittal. However, the Court ruled that there was sufficient evidence for a rational trier of fact to conclude that, in each case, the V suffered "physical injury." However, applying a plain error standard, the Court did reverse one count based on the erroneous instruction. It explained that self defense is based on D's subjective belief whereas choice of evils defense depends on the objective circumstances. REVERSED IN PART.

BURROUGHS V. STATE, (1/26/10): PROSECUTORIAL COMMENTS

D and 2 others allegedly forced a teenage girl to strip naked before robbing her. During closing argument, D commented on the testimony of the "trained police officers." D also indicated that another W was present at the scene but identified D as being there because he wanted to protect his friends who were really the ones who were present. In rebuttal, P used the same term and indicated that D wanted the jury to believe that they were lying. Additionally, P stated that the other W would be taking a big risk by lying about D being at the scene of crime without knowing if he had an alibi. D did not object to these statements. D was convicted of Robbery First, PFDCF, PDWBPP and Conspiracy Second.

On appeal, D argued that P vouched for the police witness and improperly commented on D's right not to testify during closing arguments. The Court stated that improper vouching would warrant a new trial if P suggested the jury must find a W committed perjury in order to acquit or if P encouraged the jury to disregard certain Ws while buttressing the credibility of others. Since P merely highlighted an issue raised by D that suggested police coaxed V into implicating D the Court did not find there to be improper vouching. The Court also found that P's statement regarding the alibi was not an improper comment on D's Fifth Amendment rights as it did not imply that D should have presented some evidence of an alibi. AFFIRMED.

MOODY V. STATE, (1/29/10): RESENTENCING FOR VOP

D was originally convicted of PWITD and PABPP and sentenced to 2 three-year imprisonment terms, suspended for 2 concurrent terms of eighteen-month probations. Based on new charges, a VOP report was filed 2 months later. Two years later, another VOP report was filed due to new charges in another state that D picked up while he had absconded from his Delaware probation. He was resentenced. The following year, after being released from custody, D "violated" again and was resentenced.

On appeal, D argued that when he was resentenced the final time, his original probation period had already expired and his resentencing was therefore invalid. The Court held that D was within his new probationary period which was an extension of the original probation period he violated. AFFIRMED.

MOYE V. STATE (2/17/10): BURGLARY/ "BREAKING"/BUILDING

D went into an empty structure at a construction site and took a long piece of pipe from it. The structure had a concrete floor, roof and iron pillars. It was not enclosed. D was charged with burglary and theft. D argued that P failed to establish the elements of "breaking" and "building" and thus, he could not be guilty of burglary. The trial court rejected these arguments.

On appeal, the Court noted that the legislature removed the term "breaking" because it sought to eliminate the meaningless distinction between opening a closed door and walking uninvited through an open door. Thus, P was not required to establish "breaking." The Court also concluded that there was sufficient evidence for the jury to conclude that the structure at issue was a "building." The definition of "building" is broad and includes "any structure." A structure includes construction made up of parts purposely joined together. AFFIRMED.

WILSON V. STATE, (2/18/10): PLEA OFFERS/ RECUSAL OF JUDGE

D's original convictions of robbery and related offenses were reversed. On remand, P offered a plea to 5 years L5 (3 years min/man) and indicated that the offer expired on March 15. The letter containing the offer was sent to the judge. D sent a

letter expressing displeasure with the fact that the judge received a copy of the letter. After March 15, D made a counter offer. However, P indicated that the offer had expired. D filed a motion for the judge to recuse herself because she had been reversed, had made comments demonstrating bias and received a copy of the plea offer. D also filed a motion to force P to honor its plea offer. The judge denied both motions and D pled guilty to charges of Robbery 1st, wearing a disguise during the commission of a felony, and conspiracy 2nd. He received 5 years and 9 months in jail.

On appeal, the Court held that D does not have a right to a plea offer. It was a contract offer which terminated at the March 15 deadline. The Court also concluded that there was no subjective or objective, "appearance of bias sufficient to cause doubt as to the judge's impartiality" requiring recusal. In *Jackson v. State*, the Court already ruled that there is no issue with the same judge presiding over both the original trial and the case on remand. Changing the bail amount because the judge facts available to her from the trial did not reflect bias. Finally, it is regular practice for a judge to be made aware of plea offers and, in this case, the judge never saw the letter. AFFIRMED.

CRUZ V. STATE, (2/19/10): VOP AFTER ACQUITTAL AT TRIAL

D was acquitted by a jury for criminal charges which formed the basis of D's corresponding alleged violation. The judge who presided over the trial later found D in violation based on that same evidence. D was sentenced to two years of incarceration at level V suspended after eighteen months .

On appeal, D argued that his Due Process rights had been violated because the same judge presided over his criminal trial and his probation hearing and because P was not required to present any evidence at the hearing. The Court held that this did not violate Due Process since the evidence has already been presented with all substantive and procedural Due Process protections. However, if there is a different attorney representing D at the hearing than the one who represented him at trial, that attorney must be provided with the transcripts. Here, D had the same attorney. AFFIRMED.

BOHAN V. STATE (2/23/10): WITNESS' 5TH AMENDMENT PRIVILEGE/D'S 6TH AMENDMENT RIGHT TO CONFRONT WITNESSES

D and two others were driving around a parking lot. One of them pointed a gun out the window toward two detectives. D was charged with PFDCF, PFBPP, and 2 counts of Aggravated Menacing. D's attorney told the jury in his opening statement that

W, who was also in the car, would testify that it was the third person in the car and not D who pointed the gun. W refused to testify claiming his Fifth Amendment privilege against self incrimination. D asked that W invoke in front of the jury but the judge did not permit it. Rather, the judge gave 3 curative instructions that openings and closings are not evidence. D requested a mistrial which was denied.

On appeal, the Court explained that the W's Fifth Amendment privilege overrides D's Sixth Amendment right to call W. Further, the curative instructions were "meaningful and practical alternatives" and the trial judge did not abuse her discretion because "manifest necessity" did not require a mistrial. AFFIRMED.

STATE V. CLAYTON (2/23/10): CONSTRUCTIVE POSSESSION

Certified Question: Whether the phrase "intention to guide the gun's destiny" is a required element of the constructive possession jury instruction or whether the phrase may be construed to explain how the defendant's intention, at a given time, to exercise dominion and control over a firearm might be shown?

Answer: The phrase "intended to guide the destiny of the gun" is not a required element of the constructive possession jury instruction when a defendant is charged with Possession of a Firearm by a Person Prohibited. That phrase is properly regarded as one way to explain how the State can establish the defendant's intention, at a given time, to exercise dominion and control over a deadly weapon.

PENDLETON V. STATE, (2/23/10): ADMINISTRATIVE SEARCH & GTF

Probation Officer who was part of GTF conducted a computer check on D and found that he had some dirty urines and missed curfews. So, P.O. sought and received oral approval to conduct an administrative search of D's house. Three P.O.'s and a DSP officer descended on D's house and seized 3.05 grams of crack cocaine. The trial court denied a motion to suppress and D was convicted of PWITD after a stipulated trial.

D argued the administrative search was not valid because the P.O.'s did not strictly comply with departmental regulations pre-search checklist. The Court held that a thorough analysis of the checklist was preformed over the phone with the probation officer's supervisor. The phone conversation, while not checking off the boxes on a paper form, did amount to "substantial compliance" with procedures.

Significantly, the Court reminded probation officers that their responsibility is not merely enforcement, but also to pursue the rehabilitation of their probationers. Sometimes these objectives may conflict, but any neglect of P.O.'s responsibilities other than just enforcement denigrates society's trust and confidence in the corrections system.

ROSS V. STATE, (2/23/10): ENHANCED SENTENCING FOR PFBPP

D pled guilty and was convicted of multiple crimes including possession of a Firearm by a Person Prohibited ("PFBPP"). After finding that D was convicted on two or more separate occasions of a violent felony, the judge sentenced D to a 5-year minimum mandatory sentence required by 11 *Del.C.* §1448(e) (1) a. On appeal, D argued that he should only have received 1-year minimum mandatory. D argued that 1448(e) should be construed in accordance with the analysis in 4214 for calculating predicate offenses for H.O. sentences. That analysis requires there to be "some period of time … between sentencing on the earlier conviction and the commission of the offense resulting in the later felony conviction."

The Court concluded that the language of 1448 is plain and unambiguous. The presence of prior convictions act as aggravators in the sentence. However, the H.O. statute, 4214, is designed to impose a life sentence on individuals who are not rehabilitated after separate opportunities to reform. AFFIRMED.

DISSENT: J. Ridgley opined that the intent behind all mandatory sentencing is to allow for rehabilitation.

NORWOOD V. STATE, (3/1/10): WAIVER ON APPEAL

During trial a juror asked the judge if the court could be re-arranged such that she could see D. According to the bailiff, the juror had not been able to see D the entire trial. There was discussion between counsel and the judge. Neither side seemed concerned with D's placement. The judge said, "if the defendant wants to move back, fine. . . . I'm going to let it go the way it is now." Both D and his attorney were aware of the issue and took no further action. D appealed his convictions of Robbery 1st, Possession of a Firearm during the Commission of a Felony (2 counts), Aggravated Menacing, and Conspiracy 2nd. D argued that he was deprived of a fair trial when the court did not re-arrange a portion of the court room to permit a juror to view him.

On appeal, the Court found that D waived this issue. AFFIRMED.

MCNAIR V. STATE, (3/8/10): PHOTGRAPH EVIDENCE & *D.R.E.* 404(B) /MISSING EVIDENCE INSTRUCTION

W, security guard, saw D breaking into a car in a parking garage. W recognized D from a photo that was hanging up in the security office. D told W that someone broke into his car but he did not want to file a report. When W called police, D threatened him and fled garage. After trial, D was convicted of Burglary 3rd, Theft, Offensive Touching, and Criminal Mischief.

On appeal, D argued that reference to, and admission of, a photo of himself appearing in the parking garage office, which was redacted of all information but the image, violated *D.R.E.* 404(b). D argued that introduction of the photograph and testimony that W saw it daily improperly suggested that D committed the crimes charged. The Court ruled that this was not evidence of a "prior bad act" and, thus, its admission was not subject to the *Getz* analysis. The evidence was properly analyzed under a relevance test of *D.R.E.* 403. The introduction of this evidence is similar to the introduction of a photo of a D taken in a police line-up. As long as prerequisites set forth in *Brookins v. State* are met, the evidence is admissible. Additionally, the judge's issuance of a curative instruction was sufficient to mitigate any prejudice resulting from W's statement that he saw the photo everyday. Finally, the judge's refusal to offer a *Lolly* instruction was not an error when the judge ruled a security video inadmissible because it was of poor quality and poor positioning. AFFIRMED.

ZEBROSKI V. STATE, (3/9/2010): POST CONVICTION RELIEF; PROCEDURAL BARS TO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

D was initially convicted of Murder 1st, Felony-Murder, Attempted Robbery, and sentenced to death. His convictions were affirmed. D then filed a Rule 61 which was denied. That decision was also affirmed. In 2003, D filed a Petition for Writ of Habeas Corpus in Federal Court. Shortly thereafter, D filed a second motion for postconviction relief which was stayed until the outcome of the Federal case. In 2008, after counsel was appointed, D filed a motion to reopen the postconviction motion. The judge denied D's ineffective assistance of counsel, in his prior postconviction proceedings, claims finding them barred by Superior Court Rules 61(i)(2) and (4). However, the judge vacated his felony murder conviction.

On appeal, the Court found that the trial court's one paragraph "conclusory statement that the defendant failed to show that further review is required in the interest of justice" was insufficient. Thus, this issue was remanded for the trial court to determine and individually explain whether D's ineffective assistance of counsel claims satisfies the exceptions to the procedural bars of Rule 61.

D argued on appeal that, due to the reversal of his felony murder conviction, his death sentence should be vacated because the felony murder was the main aggravating factor in the jury's determination of sentence. The Court relied on *Flamer v. State*, and held that reversal of an aggregating circumstance does not mandate the reversal of a death sentence. The record reveals that the jury unanimously found that D's attempted robbery satisfied the statutory aggravator requirement. The jury instructions reveal that the jury was separately instructed to other aggravating factors, many of which alone would suffice

for the jury to sentence the defendant to death. Any error of the jury considering inadmissible evidence of the Felony-Murder was harmless.

ADKINS V. STATE, (3/15/10): VOUCHING/WITNESSES DISCUSSING TESTIMONY

D went to trial on charges related to engaging in improper sexual acts with a minor. In his opening, P stated that V came forward "knowing that doing so ran the risk of upsetting her father" and "dividing the family." In closing, he stated the case was about "a child and costs of coming forward," that V wanted to be believed and V was not fabricating a story. D did not object to these statements. D was convicted of Rape 2nd, Endangering the Welfare of a Child, and four counts of Unlawful Sexual Conduct 2nd .

On appeal, D claimed the statements were a form of improper vouching for V. The Court cited to *White v. State*, and defined improper vouching as occurring when, "the prosecutor implies some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness has testified truthfully." Here, the statements went directly to evidence which was later offered. In addition, when credibility is at issue, the prosecution can bolster the credibility when it is attacked. D attacked V's credibility.

D also argued that the judge erred when he failed to declare a mistrial after V stated during cross examination that she spoke to another W about W's testimony during trial. The judge *sua sponte* addressed this issue at trial. D stated he was not asking for a mistrial, therefore he waived any claim of plain error on direct appeal. AFFFIRMED.

NEWTON V. STATE, (3/15/10): PROSECUTORIAL MISCONDUCT/ NECESSITY OF LAYING FOUNDATION FOR EVIDENCE

D & V were inmates at HYCF. D held V hostage for several hours while making demands of the C.O.'s. The ordeal was brought to an end when officers threw a stun grenade into the D's cell. During the stand off V received a cut on his shoulder that required several stitches. At trial, V refused to cooperate and was held in contempt. Through the excited utterance hearsay exception, P presented V's statement via a C.O. who negotiated with D. D did not present any evidence at trial and was convicted of 1st Degree kidnapping, PDWDCF and Assault in a Detention Facility.

On appeal D argued that P engaged in misconduct when he: 1) failed to force V to testify; 2) failed to have a blood stained towel tested; and 3) presented testimony known to be perjury. D also argued that the trial court erred by not allowing him present to the jury a consent form signed by V. The Court held that V's refusal to cooperate after much coercion by the trial judge was not P's fault. The Court also explained that P has a duty to collect and preserve evidence, but was not obligated to confirm the testimony of their

witnesses by testing the towel. D had not objected at trial and there was no evidence on the record to support the claim that the officer had committed perjury. Finally, the Court explained that D could not have the document admitted into evidence without a witness to lay a foundation for admission. AFFIRMED.

BENNETT V. STATE, (3/18/10): *MIRANDA* STATEMENTS

Police pulled D over for driving a car with tinted windows. Police then learned there was no insurance and that D was not the registered owner. Police had D step out of the car. D consented to a search of the car during which the officer found a nine millimeter firearm on the floor by the passenger seat. D was then handcuffed. At trial, the officer testified that he clearly read D his rights from a police-issued *Miranda* card and that D calmly and clearly stated he understood his rights. D then stated that he had been robbed so he got the gun from a friend. Over objection, the trial court admitted D's confession because the officer was credible. D was convicted of CCDW.

On appeal, D argued that he was not given all of his *Miranda* warnings and that he did not waive his rights because the officer misunderstood his accent. The Court held that the trial court did not abuse its discretion. There was no evidence that D was pressured into making a statement. Also, the trial court's factual finding that the officer was credible and that there was a clear reading of the rights cannot be second guessed on appeal. AFFIRMED.